CIVIL REVISION APPLICATION NO. 71 OF 1997.

Date of decision: 5.2.1997

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. V.C. Desai, advocate for petitioner.
Mr. Suresh M. Shah, advocate for respondent No.1.
Mr. A.J. Patel, advocate for 2 (1) and (2).

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

Coram: R.R.Jain,J.

February 5 , 1997.

Oral judgment:

Rule. Mr. S.M. Shah and Mr. A.J. Patel waive service of rule on behalf of respondent No.1 and No. 2 (1) and (2) respectively.

This application is filed by original defendant No.1 in Special Civil Suit No. 174 of 1995 against the order dated 6.11.1996 passed below Ex.9 by the learned Civil Judge (S.D.)., Bhavnagar, by which instead of staying subsequently instituted suit, ordered amalgamation with

the previously instituted suit for disposal by common trial. In short, application under Section 10 of the Civil Procedure Code (hereinafter referred to as "the Code" for convenience and brevity) for staying subsequently instituted suit was rejected by the Court.

Mr. Desai for the petitioner has argued very forcefully that provisions of Section 10 of the Code are mandatory and if a case is squarely made out to be covered under Section 10 of the Code then recourse cannot be taken to inherent powers under Section 151 of the Code and pass some other order. As against that Mr. Shah for respondent No.1/ original plaintiff and Mr. Patel for respondents No.2 (1) and (2)/ original defendants No. 2 (1) and (2) have argued that essentially the parties in both the suits are not same. Both the suits are based on different causes of action owing to some subsequent event and that no error has been committed by court below in directing consolidation of the suits as would take care of question of res judicata and apprehension of inconsistent finding in relation to same subject matter by two different courts of concurrent jurisdiction. To fortify their contentions learned advocates have also placed reliance upon various judgments of the Supreme Court and High Courts which will be dealt with at the appropriate stage.

On plain reading of Section 10 of the Code, it appears that before Section 10 of the Code can be applied to a particular case, following conditions must be satisfied:

(i) The subject matter of both the matters in issue should be substantially same.

(ii) Both the suits must be between same parties or litigating for same purpose or under same title.

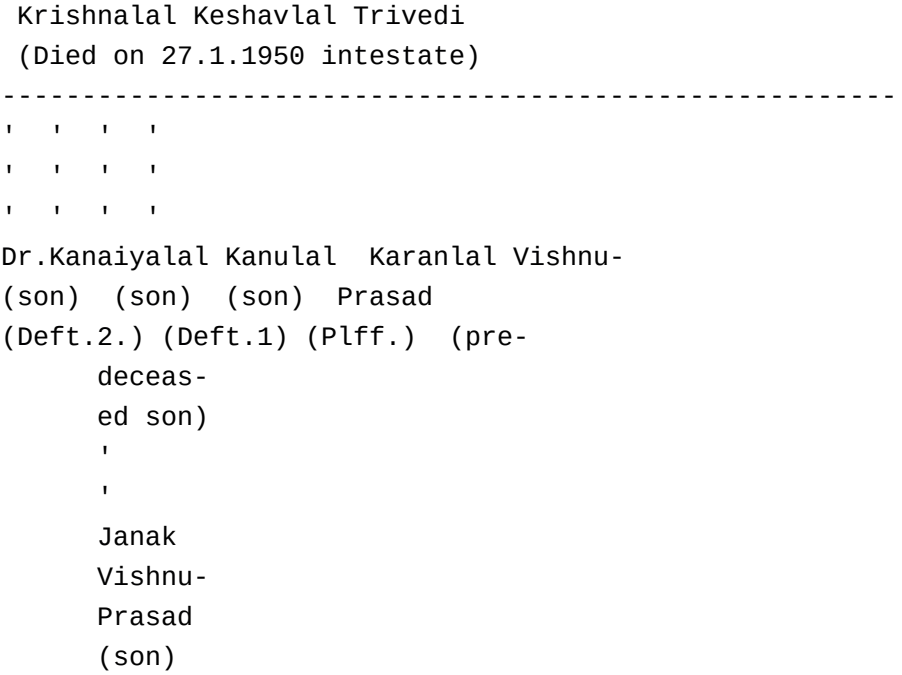
(iii) Previously instituted should be pending in the same court or any other court in India having concurrent jurisdiction to grant relief claimed in subsequent suit.

Now the question is whether the case in hand satisfies the tests referred to above. To consider this, a brief reference will have to be made to both the suits.

The petitioner has produced certified copies of both the plaints. Annexure A is a copy of the previously instituted Regular Civil Suit No.607 of 1991 whereas Annexure B is a copy of the subsequently instituted Special Civil Suit No. 174 of 1995 and Annexure C is a

comparative table/chart showing relevant particulars of both the suits.

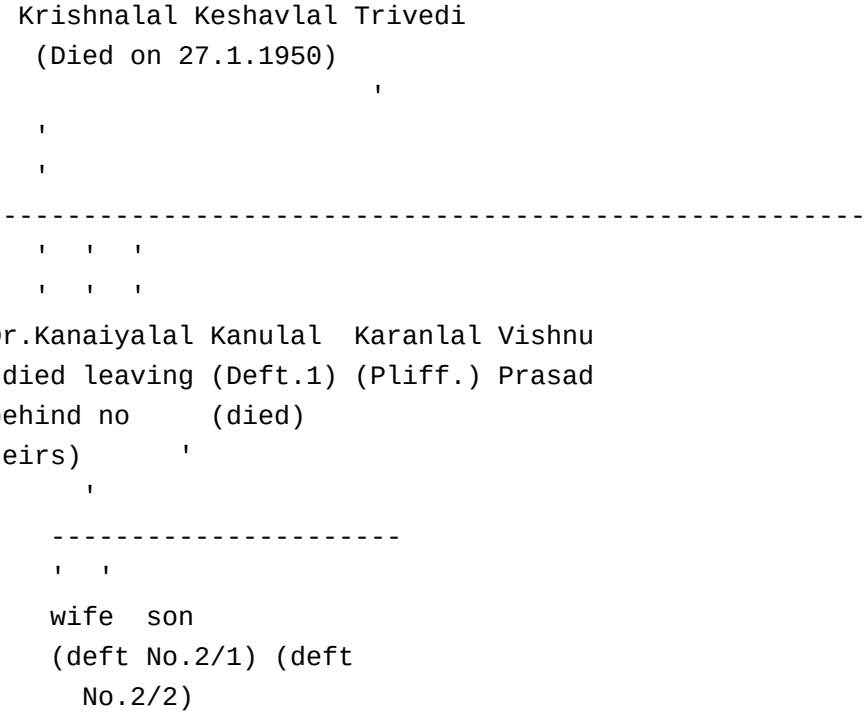
Admittedly, both the suits are filed by respondent No.1, the original plaintiff. Previous suit i.e., Regular Civil Suit No. 607 of 1991 was instituted on 28.10.1991 whereas subsequent suit i.e., Special Civil Suit No. 174 of 1995 is instituted in July 1995. The earlier suit was initially instituted in the Court of learned Civil Judge (J.D.) but now has been transferred to the court of learned Civil Judge (S.D.), whereas the subsequent suit is instituted in the court of the learned Civil Judge (S.D.)., Bhavnagar and that the previously instituted suit has yet not been finally disposed of. Thus, admittedly, previously instituted suit is pending in the same court and/or court having concurrent jurisdiction, that is, court of learned Civil Judge (S.D.). The subject matter of both the suits is immovable properties of deceased Krishnalal Keshavlal Trivedi, who died intestate. Respondent No.1/original plaintiff, as one of the sons of deceased Krishnalal, filed suit for declaration of undivided share and partition of property by metes and bounds. The plaintiff claimed division and partition of the property amongst four sons out of whom one Vishnuprasad is no longer live therefore, his share is assigned to his branch. For claiming share and division, the pedigree given in the previously instituted Regular Civil Suit No. 607 of 1991 is as under:



(deft No.3)

Thus, essentially the plaintiff claimed 1/4th undivided share in the properties of deceased Krishnalal. In the earlier suit along with all the brothers who are alive, defendant No.3, Janak Vishnuprasad is impleaded as heir and representing branch of deceased Vishnuprasad.

In the subsequently instituted suit, the subject matter of suit is also immovable properties left behind by deceased Krishnalal Keshavlal Trivedi, who died intestate on 27.1.1950. As alleged, the deceased left behind four sons same as referred to in previously instituted suit. However, as one of the sons, Dr. Kanaiyalal, who was defendant No.2 in the earlier suit, has expired leaving no heir has not been impleaded as party and Urmilaben Vishnuprasad, wife of deceased Vishnuprasad has been added as new party alongwith her son, Janak Vishnuprasad, who was already a party in the previously instituted suit representing that branch. Since one of the brothers has already expired now the plaintiff has filed subsequent suit for partition by metes and bounds claiming 1/3 share in the properties of the deceased. The pedigree is shown as under:



According to Mr. Desai as all the ingredients of Section 10 of the Code are squarely satisfied, therefore, subsequently instituted suit, that is, Special Civil Suit No. 174 of 1995 should be stayed. Relying upon the

judgment of the Supreme Court in the case of Manohar Lal v. Seth Hiralal, AIR 1962 SC 527, has argued that provisions of Section 10 of the Code are clear, definite and mandatory and if ingredients are satisfied then the court in which subsequent suit has been filed and is pending is left with no alternative than to stay.

The learned advocates for the respondents have vehemently argued that the parties are not same. While inviting my attention to both the plaints, have argued that defendant No. 2 (1) Urmilaben Vishnuprasad Trivedi in the subsequent suit was not a party in the previously instituted suit consequently any decision in the previously instituted suit cannot operate as res judicata against her as for the first time she has come before the court she cannot be denied her rights taking recourse of Section 10. The argument on the face is not palatable because though she has been joined for the first time in the subsequently instituted suit yet her right and claim is not independent of the title through which is claimed, i.e., her deceased husband, Vishnuprasad. Of course, in the previously instituted suit her son Janak Vishnuprasad alone was impleaded as defendant No.3 but then he too did not have any independent share as he also derived the claim from his deceased father, Vishnuprasad Krishnalal Trivedi, i.e., the title through which his mother is getting. Thus, though Urmilaben Vishnuprasad was not a party to the previously instituted suit she is deriving right under the same title, that is, through the entitlement of her deceased husband, in the properties of

deceased Krishnalal. As regards rest of the parties, there is no dispute that they are same and litigating for the same subject matter. Therefore, in my view, in both the suits, the parties are same and are litigating under the same title.

While opposing this application, it is also argued on behalf of the respondents that the ground of challenge and causes of action in both the suits are different contending that at the time when the earlier suit was instituted, proceeding under the Land Ceiling Act before the competent authority was pending and the same has been decided vide order dated 27.6.1995 giving rise to fresh cause of action as pleaded in subsequent suit. In my view, decision of competent authority under the Land Ceiling Act in relation to the properties of deceased, in no way, affects the entitlement i.e., shares of parties to the litigation as the claim is under the Hindu Succession Act. Despite the order of competent authority the share of respective party under the Hindu Succession

Act remains same. Even subsequent death of one of the claimants also will not affect mode of succession. At the most there may be some variation or arithmetical change in the extent of share. Despite the variation or change in extent of share, the source remains same i.e., the rights of respective parties under the Hindu Succession Act.

Relying upon the decision of the Delhi High Court in the case of C.L. Tandon v. Prem Pal Singh, AIR 1978 Delhi 221, learned advocates for the respondents have argued that merely because one of the major issues is common in both the suits is not sufficient to stay the subsequently instituted suit under Section 10 of the Code. One valuable touchstone for determining whether the matters in issue are directly and substantially the same is whether the decision in the prior suit will bring the principle of res judicata into operation in the subsequent suit. In this case, even though Urmilaben Vishnuprasad has been impleaded for the first time in the subsequent suit alongwith her son Janak Vishnuprasad, decision in earlier suit will definitely operate as res judicata as her claim is through her deceased husband only. In earlier suit though his son was shown as sole heir to succeed the branch but the principal question was the share of deceased Vishnuprasad. Since the entire branch of deceased has the same share in the properties whether it is claimed by one of the heirs or more, therefore, on facts, the decision in earlier suit would operate as res-judicata qua the claim of Urmilaben. Thus, the matter in issue is also directly and substantially same.

It is further argued on behalf of the respondents that object of Section 10 of the Code is to prevent courts of concurrent jurisdiction from adjudicating upon parallel litigation between same parties having same subject matter in issue and to avoid conflict of decisions and, therefore, instead of staying the subsequent suit, if both suits are consolidated, apprehension of res judicata and inconsistent finding can be avoided and interest of judicial comity can be maintained. On this point Mr. Shah has placed reliance on a judgment of this Court in the case of M/s. Sohal Engg. v. Rustom Jehangir Mills, XXII G.L.R. 491, wherein instead of staying subsequent suit under Section 10 of the Code, hearing of both the suits was consolidated in exercise of inherent powers. Mr. Shah has also placed reliance on an unreported judgment of this Court (Coram: B.J. Divan, J.) dated 20.8.1963 rendered in the case of The Bharat Sarvodaya Mills v. M/s. Mohotta Bros., in Civil Revision

Application No. 504 of 1963 approving trial court's order of consolidation instead of staying subsequent suit under Section 10 of the Code. It is true that depending upon the facts and circumstances of individual case consolidation of suits can be ordered instead of staying subsequently instituted suit for avoiding possibility of inconsistent finding by courts of concurrent jurisdiction. Such an order can be passed under Section 151 of the Code but where provisions are clear and all the ingredients are squarely satisfied then such contingency can be dealt with by taking recourse to specific and clear provisions. In such contingency inherent powers cannot be invoked. The relevant provisions have to be enforced otherwise the object of specific provisions would be rendered nugatory. In the case of Sohal Engineering (supra) though both the suits arose from the same contract and the parties were same but the subject matter, that is, the issue was not same, therefore, on facts it was held that it is not covered by Section 10 of the Code consequently there was no question of staying subsequent suit. However, keeping in mind the fact that in order to resolve controversy in both the suits, practically the parties will have to examine same witnesses and produce similar documents. The process would be duplication of work and waste of public time and entail expenses. Thus, to avoid inconvenience to witnesses figuring in both the suits, to save public time and expenses, consolidation of suits was ordered. In this case, as discussed above, all the ingredients and tests of Section 10 of the Code are squarely satisfied, and provisions being mandatory, shall be implemented and subsequent suit has to be stayed.

As held by the Supreme Court in the case of Manoharlal (supra) when there is specific provisions in the Code for dealing with contingency of two suit, recourse to inherent powers under Section 151 of the Code is not justified. In a given case provisions of Section 10 cannot be made inapplicable merely holding that the previously instituted suit is vexatious or has been instituted in violation of terms of a contract. Consequently, in case in hand, the impugned order for amalgamation of both the suits passed invoking inherent powers cannot be sustained. Thus the Court below has committed a patent error in exercising powers under Section 151 of the Code in ordering consolidation of both the suits when the case is squarely covered by specific provision namely Section 10 of the Code.

In the result, the application is allowed. Impugned order dated 6.11.1996 passed by the learned Civil Judge

(S.D.)., Bhavnagar, below Ex.9 in Special Civil Suit No. 174 of 1995 is hereby quashed and set aside. Application Ex.9 stands allowed. Further trial of Special Civil Suit No. 174 of 1995 is stayed till disposal of Regular Civil Suit No. 607 of 1991. Rule is made absolute with no order as to costs.